



**THE ATTORNEY GENERAL
OF TEXAS**

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February 6, 1968

John Reeves

Hon. Robert S. Calvert
Comptroller of Public
Accounts
Austin, Texas

Opinion No. M-198

Re: Construction of Section 8(C) of Article 678f, Vernon's Civil Statutes, relating to the certification by the Comptroller that a contract awarded by the State is not in excess of the amount available for such project.

Dear Mr. Calvert:

Your request for an opinion reads as follows:

"The Comptroller of Public Accounts respectfully requests your official opinion in regard to the question stated hereinbelow.

"Section 8(C), Article 678f of the State Building Construction Administration Act provides pertinently as follows:

"Subject to the applicable provisions of other law respecting the award of State contracts, the contract or contracts shall be awarded to the qualified bidder making the lowest and best bid; but no contract shall be awarded for a sum in excess of the amount which the Comptroller shall certify to be available for such project . . ."

"Under normal administrative procedures a proposed contract award for a public works project is forwarded to the Comptroller for certification of funds available therefor from State appropriations. In the instance in which adequate State funds have

been appropriated for the complete performance of the project the Comptroller certifies on the proposed contract award that sufficient funds are available for the contract, whereas in the event State appropriations are less than the proposed contract price the certification states the exact amount available for the project.

"The Comptroller has received requests for payment of claims under construction contracts which were awarded:

- 1) Without requesting the Comptroller's certifications but for which there were sufficient funds available to pay the face amount of the contract; and

- 2) Without requesting the Comptroller's certifications, but for which the funds available were insufficient to pay the face amount of the contract; and

- 3) For an amount in excess of the funds which were certified to be available for the contract.

"In view of the foregoing, your official opinion is requested whether the Comptroller may make progress payments or pay other claims pursuant to an awarded public works contract under each of the circumstances listed above."

The provisions of Section 8(C) of Article 678f, Vernon's Civil Statutes, quoted in your request, were construed in Attorney General's Opinion No. M-177 to authorize the Comptroller to execute certifications provided therein when the amount of State funds appropriated by the Legislature, together with the amount of Federal funds approved and obligated for such project, is equal to or exceeds the amount of the awarded contract. It was further held that State funds may be expended by progress payments until the appropriation has been exhausted.

Under the facts stated in your first question,

there were sufficient funds available to pay the amount of the award, therefore, such award created an obligation binding on the State and you are authorized to make payment of claims under such contract. However, as good business practice, the Comptroller's certificate that sufficient funds are available, should be secured before the contract is awarded.

Under the facts stated in your second and third questions, funds available for such projects were insufficient to pay the amount of the award. Section 8(C) of Article 678f, Vernon's Civil Statutes, specifically provides, ". . . no contract shall be awarded for a sum in excess of the amount which the Comptroller shall certify to be available for such project," Thus, where an award is made in excess of the amount available to pay the award, such award is made in violation of Section 8(C) of Article 678f and does not create an obligation binding on the State. Fort Worth Cavalry Club v. Sheppard, 125 Tex. 339, 83 S.W.2d 660 (1935); State v. Ragland Clinic - Hospital, 138 Tex. 393, 159 S.W.2d 105 (1942); Nichols v. State, 32 S.W. 452 (Tex.Civ.App. 1895, error ref.); State v. Perlstein, 79 S.W.2d 143 (Tex.Civ. App. 1935, error disp.); State v. Steck Co., 236 S.W.2d 866 (Tex.Civ.App. 1951, error ref.).

Therefore, in making a contract governed by the provisions of Section 8(C) of Article 678f, Vernon's Civil Statutes, the officers of the State can exercise only those powers conferred on them by law; and if the award is made in excess of the amount available for such project, no legal liability exists against the State. See authorities cited above. Under such circumstances, the Comptroller is not authorized to make progress payments by reason of the unenforceable contract.

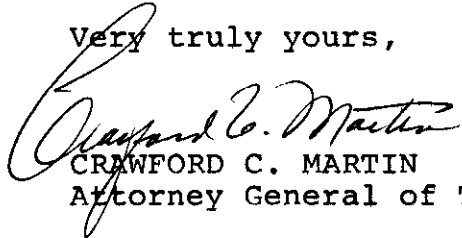
S U M M A R Y

When an award for construction projects is made pursuant to the provisions of Section 8(C) of Article 678f, Vernon's Civil Statutes, and such award is not in excess of the amount available for such project, progress payments for payment of claims under such construction contracts may be paid. Whenever an award for construction projects governed by the provisions of Section 8(C) of Article 678f, Vernon's Civil Statutes, is made for a sum in excess of

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the amount available for such project, such award does not create a legal obligation against the State and the Comptroller is not authorized to issue warrants in payment of claims under such unenforceable contract.

Very truly yours,


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